

## APPENDIX C

## FINAL REGULATORY FLEXIBILITY ANALYSIS

*(For Report and Order)*

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>136</sup> an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Notice of Proposed Rulemaking (NPRM)* was incorporated therein.<sup>137</sup> The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. No comments were submitted specifically in response to the IRFA. We nonetheless discuss certain comments below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>138</sup>

**Need for, and Objectives of, the Report and Order:**

2. In this *Report and Order (R&O)* we adopt competitive bidding rules for the 800 MHz commercial Air-Ground Radiotelephone Service and the 400 MHz general aviation Air-Ground Radiotelephone Service. Such rules are necessary because, under Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), the Commission is required to choose among mutually exclusive applications for spectrum licenses using competitive bidding, except in certain cases not applicable here. We have revised our rules governing the four megahertz of dedicated spectrum in the 800 MHz commercial Air-Ground Radiotelephone Service and intend to make new licenses available in this service.<sup>139</sup> If mutually exclusive applications are filed for these licenses, the Commission will be required to resolve such applications by competitive bidding. We also have pending before us nine groups of mutually exclusive applications for licenses in the 400 MHz general aviation Air-Ground Radiotelephone Service, and we will schedule an auction to resolve these applications. In addition to adopting our proposal in the *Notice of Proposed Rulemaking* to apply our general Part 1 competitive bidding rules to both the 800 MHz commercial air-ground service and the 400 MHz general aviation air-ground service, we adopt bidding credits for small businesses in the 800 MHz commercial air-ground service in order to help small entities attract capital to participate in the 800 MHz air-ground auction.

**Summary of Significant Issues Raised by Public Comments in Response to the IRFA:**

3. No comments were submitted specifically in response to the IRFA.

**Description and Estimate of the Number of Small Entities to Which the Rules Will Apply:**

4. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.<sup>140</sup> The RFA generally

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<sup>136</sup> See 5 U.S.C. §§ 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (SBREFA).

<sup>137</sup> See Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 4403 (2005) (*Air-Ground R&O and NPRM*); see also *R&O*, *supra* note 1.

<sup>138</sup> See 5 U.S.C. § 604.

<sup>139</sup> See generally *Air-Ground R&O*, 20 FCC Rcd 4403 (2005).

<sup>140</sup> 5 U.S.C. § 604(a)(3).

defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>141</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>142</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>143</sup>

5. The SBA has not developed a specific small business size standard for the Air-Ground Radiotelephone Service. The SBA has, however, developed a small business size standard for wireless firms within the two broad economic census categories of “Paging”<sup>144</sup> and “Cellular and Other Wireless Telecommunications.”<sup>145</sup> Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category that operated for the entire year.<sup>146</sup> Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.<sup>147</sup> Thus, under this second category and size standard, the majority of firms can be considered small. In addition, annual FCC data show that 437 carriers have reported that they are engaged in the provision of “wireless telephony,” which includes cellular service, personal communications service, and specialized mobile radio telephony.<sup>148</sup> We have estimated that 260 of these are small, under the SBA small business size standard.<sup>149</sup> Finally and more specifically, we have determined that currently there are 11 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard for “Cellular and Other Wireless Telecommunications.”

6. As we proposed in the NPRM, we today adopt small business size standards specific to the 800 MHz commercial Air-Ground Radiotelephone Service. Thus, we define a small business as an entity with average annual gross revenues for the three preceding years not exceeding \$40 million, and we define a very small business as an entity with average annual gross revenues for the three preceding

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<sup>141</sup> 5 U.S.C. § 601(6).

<sup>142</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>143</sup> 15 U.S.C. § 632.

<sup>144</sup> 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

<sup>145</sup> *Id.*

<sup>146</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued Oct. 2000).

<sup>147</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

<sup>148</sup> FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (June 2005). This source uses data that are current as of October 1, 2004.

<sup>149</sup> *Id.*

years not exceeding \$15 million.<sup>150</sup> We do not know how many entities interested in providing commercial air-ground service fall within these definitions. For purposes of this FRFA, we assume that a significant percentage of such entities will be small businesses or very small businesses under these definitions. We have not adopted small business size standards specific to the 400 MHz general aviation Air-Ground Radiotelephone Service. We therefore will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," i.e., an entity employing no more than 1,500 persons, for the 400 MHz general aviation air-ground service.<sup>151</sup> As noted above, there are 11 licensees in the Air-Ground Radiotelephone Service. Ten of these operate in the general aviation Air-Ground Radiotelephone Service, and we estimate that all or almost all of them qualify as small under the SBA small business size standard. In addition, as noted above, we have pending before us nine groups of mutually exclusive applications for licenses in the 400 MHz general aviation Air-Ground Radiotelephone Service; these nine groups include six applicants that are not already licensees in the general aviation Air-Ground Radiotelephone Service. As with the licensees in this service, we estimate that all or almost all of these six applicants qualify as small under the SBA small business size standard. We also estimate that all or almost all of any future applicants in the 400 MHz general aviation Air-Ground Radiotelephone Service will be small under the SBA small business size standard.

**Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements:**

7. The R&O does not establish new reporting, recordkeeping, or other compliance requirements but extends the Commission's existing Part 1 competitive bidding rules to the Air-Ground Radiotelephone Service. Applicants for air-ground licenses will therefore be required to file a short-form application on FCC Form 175 to participate in auctions, and auction winners will be required to file a long-form application on FCC Form 601. While these application requirements are new with respect to applicants in the air-ground services, they are the same application requirements the Commission has applied to other auctionable services for a number of years.

**Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:**

8. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."<sup>152</sup>

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<sup>150</sup> We sought consultation regarding these size standards with the SBA, as required by the Small Business Act, 15 U.S.C. § 632(a)(2)(c), and 13 C.F.R. §§ 121.901-903. On January 26, 2005, the SBA indicated that these size standards appeared reasonable and that it had no specific comments. See Letter from Gary M. Jackson, Assistant Administrator for Size Standards, U.S. Small Business Administration, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated January 26, 2005. No parties filed comments opposing these size standards. On September 19, 2005, the SBA approved the Commission's request to adopt these small business size standards for the commercial air-ground service. See Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated September 19, 2005.

<sup>151</sup> 13 CFR § 121.201, NAICS codes 513322 (changed to 517212 in October 2002).

<sup>152</sup> 5 U.S.C. § 603(c)(1) – (c)(4).

9. We have taken significant steps to assist small entities. For instance, we have adopted our proposal to auction both 800 MHz commercial and 400 MHz general aviation air-ground licenses in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's Rules. We believe that use of these well-established rules provides consistent guidance, reduces burdens on bidders and the Commission, and avoids undue delay in the provision of services.<sup>153</sup>

10. In addition, to provide opportunities for small entities to participate in the 800 MHz commercial air-ground auction, we offer bidding credits to small businesses (entities with average annual gross revenues for the three preceding years not exceeding \$40 million) and very small businesses (entities with average annual gross revenues for the three preceding years not exceeding \$15 million). The bidding credits adopted are 15 percent for small businesses and 25 percent for very small businesses. These bidding credits are consistent with the Commission's standardized schedule of bidding credits at 47 C.F.R. § 1.2110(f)(2). One party, Verizon Airfone Inc., filed comments opposing the adoption of bidding credits in the 800 MHz commercial air-ground auction. Two parties, AirCell, Inc., and Space Data Corporation, filed comments requesting higher bidding credits than those we adopt. We conclude that bidding credits are appropriate for the 800 MHz commercial air-ground service and that AirCell, Inc., and Space Data Corporation have not provided sufficient support for departing from the Commission's Part 1 bidding credit schedule, which the Commission has used effectively since 1997 to promote the participation of small businesses in auctions and whose predictability is helpful to small businesses in the business planning and capital fundraising process.<sup>154</sup>

11. No parties filed comments on the issue of whether small business bidding credits would be appropriate for the 400 MHz general aviation Air-Ground Radiotelephone Service. As discussed in the R&O, general aviation air-ground licenses are generally held by relatively small businesses, and larger telecommunications providers do not routinely apply for them. Moreover, the initial auction for the nine general aviation licenses for which we have received applications will be limited to those parties with applications already on file. Given these circumstances, we conclude that bidding credits are unnecessary in the auction of these licenses. If in the future we are presented with evidence of a need for bidding credits in the 400 MHz air-ground service, we will reconsider this issue, but we find no need for bidding credits in this service under current circumstances.

12. Concerning compliance burdens, we note that the requirement of filing applications on appropriate forms is necessary in order to ensure that applicants are qualified to participate in auctions and hold licenses. Certain information required on FCC Form 175 is also necessary to ensure that only applicants that qualify as small businesses or very small businesses receive the bidding credits offered to such entities. We have reduced the burden of the application process wherever possible by requiring limited information on FCC Form 175 and requiring more complete information only from auction winners on FCC Form 601.

#### **Report to Congress:**

13. The Commission will send a copy of this R&O, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>155</sup> In addition, the Commission will send a copy of this R&O, including this FRFA, to the Chief Counsel for Advocacy of the Small Business

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<sup>153</sup> See R&O, *supra* ¶ 23.

<sup>154</sup> See R&O, *supra* ¶ 36. See generally 47 C.F.R. §§ 1.2110(f)(1), (2).

<sup>155</sup> See generally, 5 U.S.C. § 801 (a)(1)(A).

**STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS  
APPROVING IN PART, CONCURRING IN PART**

*In the Matter of Amendment of Part 22 of the Commission's Rules To Benefit the Consumers of Air-Ground Telecommunications Services; Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules, WT Docket No. 03-103*

*Amendment of Parts 1 and 22 of the Commission's Rules To Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service, WT Docket No. 05-42*

*Application of Verizon Airfone Inc. for Renewal of 800 MHz Air-Ground Radiotelephone License, Call Sign KNKG804, File No. 0001716212*

*Order on Reconsideration and Report and Order, adopted December 8, 2005.*

Today's action brings airline passengers one step closer to realizing the benefits of new air-to-ground broadband services. The current narrowband air-to-ground service – which is expensive and limited to voice – has not lived up to expectations. New air-to-ground broadband will afford passengers a wider and more cost-effective array of services, and I encourage the auction winner to roll these services out to passengers as quickly as possible.

Notwithstanding my enthusiasm for new consumer broadband options in the skies, I concur in part due to my concerns that our original decision created the strong possibility of a monopoly licensee in air-to-ground broadband services. Although that issue is no longer before us, I remain concerned that America's aviation industry and its passengers will not have the full range of choices in air-to-ground broadband that they might otherwise have enjoyed. We must nevertheless proceed forward based on the decisions already taken to ensure the timely deployment of broadband for the benefit of the flying public.

**STATEMENT OF  
COMMISSIONER JONATHAN ADELSTEIN  
APPROVING IN PART, CONCURRING IN PART**

*In the Matter of Amendment of Part 22 of the Commission's Rules To Benefit the Consumers of Air-Ground Telecommunications Services; Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules, WT Docket No. 03-103*

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I remain very optimistic about the prospects of broadband in the sky. As a frequent traveler, I look forward to the day that I can take advantage of time in the air to upload my latest speech, catch up on e-mail, or maybe even do some on-line shopping for one of my children's upcoming birthday. For so many travelers, these new services will increase their productivity and enhance their quality of life.

When we adopted the initial Report and Order in this proceeding almost a year ago, I expressed concern that we had lost a golden opportunity to guarantee true broadband competition in the air by requiring that two providers have access to the larger three megahertz licenses. Instead, we proffered a number of different band plans under the mantra of "let the market decide." Unfortunately, this regulatory punt could result in the incumbent narrowband provider, Verizon Airfone, securing the exclusive three megahertz license, which would allow the company to occupy the entire block of 800 MHz Air to Ground (ATG) spectrum for the next four years. This is enormous power over the future of ATG service if left unchecked.

It is important to put this in context. Notwithstanding the availability of satellite broadband services, we currently have very little, if any, broadband services available on U.S. airplanes because of the size and expense of satellite broadband services. Our decision last year, from which I dissented in part, failed to guarantee a truly competitive broadband market in the ATG service. Moreover, if Airfone wins the exclusive three megahertz license, it will control the four megahertz of 800 MHz ATG spectrum for the foreseeable future. To make matters worse, our only real hope for competition in the broadband market may be the holder of the one megahertz 800 MHz ATG license, and Airfone may have the ability to block that new entrant from entering the market until May 2010.

I am pleased that my colleagues agreed to put in place rigorous reporting requirements on Airfone to help us provide oversight to prevent unnecessary delays in its transition from a four megahertz narrowband system to a one megahertz system. This should give potential bidders some comfort that the Commission will be monitoring the pace of transition, which we will need to do effectively. Also, in the event Airfone, or one of its affiliates, wins the exclusive three megahertz license, we will put in place a second set of reporting requirements to ensure that the company swiftly migrates its narrowband system to a broadband one. The one megahertz licensee may be our only hope for any type of broadband competition. If at all possible, we should try to get the spectrum in the hands of that company as soon as possible. If Airfone has essentially completed its migration from narrowband to broadband, there is no reason to allow it to retain the one megahertz license for the full five years. I will keep a close eye on these reports, and I hope all of my colleagues will as well.

Ultimately, we could have taken a number of more specific actions to support competition in the event Airfone wins the exclusive three megahertz license. But we fail to do so today. For that reason, and for other statements made in this item that rely on the portion of the original Report and Order from which I dissented, I must concur in part to this decision.